

INFORMATION SHEET
DETERMINATIONS OF NO JURISDICTION FOR ISOLATED, NON-NAVIGABLE, INTRA-STATE WATERS RESULTING
FROM U.S. SUPREME COURT DECISION IN SOLID WASTE AGENCY OF NORTHERN COOK COUNTY
V. U.S. ARMY CORPS OF ENGINEERS

DISTRICT OFFICE: Philadelphia

FILE NUMBER: CENAP-OP-R-200600393

REGULATORY PROJECT MANAGER: Kevin Dougherty Date: May 9, 2006

PROJECT REVIEW/DETERMINATION COMPLETED: In the office N (Y/N) Date: _____
At the project site Y (Y/N) Date: 5/8/2006

PROJECT LOCATION INFORMATION:

State: Delaware

County: New Castle

Center coordinates of site by latitude & longitudinal coordinates: 39-35-16.38 N/75-43-15.98 W

Approximate size of site/property (including uplands & in acres): 8.45 acres

Name of waterway or watershed: Belltown Run (Christina River)

SITE CONDITIONS:

Type of aquatic resource ¹	0-1 ac	1-3 ac	3-5 ac	5-10 ac	10-25 ac	25-50 ac	> 50 ac	Linear feet	Unknown
Lake	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
River	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Stream	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Dry Wash	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mudflat	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Sandflat	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Wetlands	<input type="checkbox"/>	<input checked="" type="checkbox"/> 1.48 acre	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Slough	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Prairie pothole	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Wet meadow	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Playa lake	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Vernal pool	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Natural pond	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Other water (identify type)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

¹Check appropriate boxes that best describe type of isolated, non-navigable, intra-state water present and best estimate for size of non-jurisdictional aquatic resource area.

Migratory Bird Rule Factors ¹ :	If Known		If Unknown Use Best Professional Judgment		
	Yes	No	Predicted to Occur	Not Expected to Occur	Not Able To Make Determination
Is or would be used as habitat for birds protected by Migratory Bird Treaties?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is or would be used as habitat by other migratory birds that cross state lines?	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is or would be used as habitat for endangered species?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Is used to irrigate crops sold in interstate commerce?	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

¹Check appropriate boxes that best describe potential for applicability of the Migratory Bird Rule to apply to onsite, non-jurisdictional, isolated, non-navigable, intra-state aquatic resource area.

TYPE OF DETERMINATION: Preliminary ☐ Or Approved ☒

ADDITIONAL INFORMATION SUPPORTING NJD (e.g., paragraph 1 – site conditions; paragraphs 2-3 – rationale used to determine NJD, including information reviewed to assess potential navigation or interstate commerce connections; and paragraph 4 – site information on waters of the U.S. occurring onsite):

1. Site Conditions

The property is an 8.45 acre (gross) L-shaped tract with the major axis oriented north-south (perpendicular to Porter Road (Road 400)). The tract has 200 feet of frontage along Porter Road and extends approximately 576 feet south to a point where the property widens to 400 feet. From this point the property extends a further 600 feet to the southern site boundary. A roughly 30-foot wide sanitary sewer line right of way begins at Porter Road on the western side of the property and extends to the southern site boundary. The majority of the site is wooded except for the sanitary right of way which is maintained in a herbaceous cover. The owner has recently cleared shrubs and small trees from proposed building lots to the east of the sanitary right of way. Areas west of the sanitary line are undisturbed seral woodlot and scrub-shrub. Land use to the east and west of the property is rural residential; areas to the south and to the north (across Porter Road) are fallow agricultural fields.

A delineation prepared by James McCulley Environmental Consultants Inc. (Newark, DE) in September 2005 identified an approximately 1.50 acre wetland on the property. This wetland consisted of palustrine forested wetlands to the west of the sanitary line, palustrine emergent wetlands on the sanitary line, a small area of palustrine forest to the east of the sanitary line and a small east-west ditch located where the property expands to the 400 foot width. Based on a site inspection of the property on May 8, 2006, this office concurs with the consultant's delineation as except for a minor change in the boundary along the southern end of the sanitary easement, all areas shown on the consultant's delineation had hydric soils, evidence of wetland hydrology, and a prevalence of hydrophytic vegetation. The area noted by the consultant as a ditch was found to have hydric soils and to support a sparse layer of hydrophytic vegetation. However, it did not have evidence of a discrete, well defined Ordinary High Water (OHW) line with the exception of the excavated banks. The ditch varies in depth from roughly 0.25 to 1.5 feet. As such, the ditch was considered to be a wetland rather than a waterway. After incorporating the field change, the on-site wetland area was determined to be 1.48 acres.

2. Determination Rationale

a. No ephemeral, intermittent or perennial streams were observed on the site during the field inspection. Examination of the near portions of adjoining properties also found no streams adjacent to the property. Any flow in the wetland originally identified as a ditch would have been to the west (onto the site); no channels flowing west (off-site) were observed. Based on this data, a preliminary determination was made in the field that the wetlands on the site were not contiguous, bordering, or neighboring a stream that was part of the surface tributary system of a water of the United States. Upon return to the office a series of aerial photographs were obtained for the years 1937, 1954, 1992, 1997, and 2002 from the Delaware DataMIL; additional aerial photography examined included the 1962 material used in the Soil Survey for New Castle County, Delaware (sheets 25 and 29); 1992 stereorthophotograph sheets 2-142 and 2-146 (August 1, 1992) and AirPhoto USA coverage (June 2004). Both the 1937 and 1954 photography shows that the area now identified as wetland was agricultural field. The closest stream is an unnamed tributary to Belltown run located approximately 600 feet east of the eastern side of the Mayo property. A linear structure, possibly a ditch, extends through the Mayo property but appears to terminate on a roadway some 200 feet west of the unnamed tributary. The Soil Survey identifies this ditch as an unclassified intermittent stream and indicated that it was connected to the unnamed tributary. The 1992, 1997, 2002, and 2004 photography all show a linear structure along the same alignment but none of this photography shows a clear connection to the unnamed tributary. Both the 1992 and the 2002 photography indicates that the structure has been disrupted a several points. Examination of the stereo pairs did not support connection of the linear structure to the unnamed tributary. Based upon the field inspection and the examination of the aerial photography, this office found that: 1) there were no streams or other waterbodies on the property; 2) that presently there are no connections to a surface tributary system of a water of the United States on the property; 3) that even if water were to enter the ditch, flow would be to the west, onto the site and that water would not move in the direction of the eastern (closest) unnamed tributary; 4) that the closest stream to the wetland on the property was more than 600 feet away to the east and that the closest stream to the west was more than 1000 feet, given the size of the streams and the distances, the wetlands on the property are too distant to be considered neighboring to either stream. Based upon the lack of physical connection with either stream and the distance from the wetland to either tributary, the wetland is not contiguous with, or adjacent to, a water of the United States and therefore it is an isolated intrastate wetland.

b. To determine if jurisdiction could be asserted the following factors were considered:

1. The area has no permanent standing water and could not support any type of vessel. The area is therefore not navigable in fact.
2. The small size of the wetland and the lack of any unusual properties make it unlikely that the wetland could be used for recreational, educational, or scientific use by interstate or foreign travelers (33 CFR 328.3 (a)(3)(i)) and there is no record of such use. The wetland supports neither fish nor shellfish and water from it could be used neither to irrigate crops nor for industrial or commercial processes that could produce goods sold or transported in interstate or foreign commerce (33 CFR 328.3 (a)(3)(iii)). The wetland does not contain merchantable timber, there are no known mineral deposits, and the area does not contain sand or gravel deposits that could be extracted and sold in interstate or foreign commerce (33 CFR 328.3 (a)(3)(iii)).

c. Based upon the factors considered above, the wetland is an isolated, intrastate wetland with no nexus to interstate or foreign commerce. As such, pursuant to 33 CFR 328.3, it is not a water of the United States, and is not subject to Section 404 of the CWA. This office concluded that the wetland on the Mayo property is an isolated wetland.

3. Waters of the United States

There are no waters of the United States on the site. The closest waters of the United States are two unnamed tributaries to Belltown Run and wetlands adjacent to these tributaries. The unnamed tributary to the east is approximately 600 feet from the property; the unnamed tributary to the west is approximately 1000 feet from the property.